(1) Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1999

ANTHONY CASSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED FOR REVIEW

Should the Court resolve the conflict between the Second Circuit and Eighth Circuit Courts of Appeals regarding the standards for reviewing whether the government's refusal to file a motion pursuant to §5K1.1 of the United States Sentencing Guidelines is appropriate once the government has conceded that the defendant has provided "substantial assistance" in the investigation and/or prosecution of another person?

1. Was Mr. Casso denied Due Process by the District Court's and Court of Appeals' decision to deny him a hearing to determine whether or not the government acted in "good faith" in refusing to file a motion pursuant to §5K1.1 on his behalf?

LIST OF PARTIES

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this Petition.

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OPINION BELOW

The Order and Opinion of the District Court is reported at 9 F. Supp.2d 199 (E.D.N.Y. 1998), and is reproduced herein as Appendix A. The Summary Order of the United States Court of Appeals, dated April 28, 1999, is reproduced herein as Appendix B. It is reported at *United States v. Gigante*, 173 F.3d 847 (2d Cir. 1999) (Table), and the text is available on WestLaw at 1999 WL 265020. The United States Court of Appeals' July 26, 1999, Order denying Mr. Casso's Petition for Rehearing is unreported, and is reproduced herein as Appendix C.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals denying Mr. Casso's Petition for Rehearing was entered July 26, 1999. There has not been an application to extend the time period in which this Petition must be filed. Petitioner seeks review of a final decision by a federal Circuit Court of Appeals in a criminal case. Thus, jurisdiction for the Petition exists pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Constitutional Provisions

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutory Provisions

United States Sentencing Guidelines, §5K1.1.

Substantial Assistance to Authorities (Policy Statement)

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's

assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

In *Wade v. United States*, 504 U.S. 181 (1992), this Court ruled that the government could not withhold a motion pursuant to §5K1.1 of the United States Sentencing Guidelines – which permits a judge to depart downward from the Guidelines based on a defendant's "substantial assistance" to the government in the investigation and/or prosecution of another person – based on an "unconstitutional motive[.]" 504 U.S. at 186.

Since this Court's decision in *Wade*, the lower courts have developed other grounds limiting the government's ability to disavow its obligation to file a §5K1.1 motion for *non*-constitutional reasons. However, two Circuit Courts of Appeals are in irreconcilable conflict with respect to the standards to be applied when a defendant has provided "substantial assistance," but has in some other way violated his or her cooperation agreement.

The Second Circuit, in this case and others, has held that if the government has acted in "good faith," its exercise of discretion is unreviewable. In contrast, the Eight Circuit, in *United States v. Anzalone*, 148 F.3d 940 (8th Cir.), *opinion vacated and rehearing* ***en banc*** *granted* 148 F.3d 940, ***en banc*** *hearing order vacated, and panel opinion reinstated*, 161 F.3d 1125 (1998), held that once the government acknowledged the defendant's "substantial assistance," it was compelled to file the §5K1.1 motion, and was free to alert the sentencing court to any misconduct committed by the defendant in the course of the cooperation agreement.

It is respectfully submitted that in the context of this case, in which the government conceded that Mr. Casso provided "substantial assistance," but nevertheless repudiated the cooperation agreement based on alleged violations of the agreement – in the form of other misconduct – that did not impair the value of Mr. Casso's cooperation, and which the government

tolerated when committed by other cooperating defendants, this conflict between the Circuit Courts of Appeals should be resolved.

Prior to his arrest in early 1994, Anthony Casso was an underboss in the Lucchese Family of organized crime. In March 1994, shortly after his apprehension on federal charges, Mr. Casso and the government entered into a plea and cooperation agreement. As a result, Mr. Casso pleaded guilty March 1, 1994, to 70 counts of the Indictment against him.

During the course of his cooperation, which lasted more than three years, he provided invaluable information to the government on a variety of diverse subjects, including (a) the internal operations of organized crime; (b) police corruption, including a murder for hire committed by two New York City police officers at the behest of organized crime; (c) diplomatic misconduct, including involvement in drug-smuggling; and (d) organized crime's infiltration of legitimate businesses. J.A. 216-18. As a result, the government conceded below, and the District Court found, that Mr. Casso had indeed rendered "substantial assistance" to the government. J.A. 108, 420; Appendix A at A6.[1]

However, Mr. Casso also committed certain misconduct while in prison during that period. In early 1997, he assaulted another cooperating inmate who had two months earlier assaulted Mr. Casso. Also, during the course of his imprisonment, Mr. Casso, along with other cooperating defendants, had bribed prison officials for the purpose of smuggling contraband (such as food, clothing, and appliances) into the prison.

Mr. Casso revealed the smuggling that was occurring at FCI Fairton to two FBI agents in a June 1995 meeting at that facility, and offered to assist the FBI in a "sting" operation designed to expose the smuggling and the corrupt prison officials.

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

J.A. 252A-252B, 476-477.

Instead, Mr. Casso was abruptly transferred to FCI Otisville. J.A. 231. Almost two years later, April 24, 1997, Mr. Casso met with three AUSA's, FBI agents, and his lawyer. At that meeting, Mr. Casso again admitted his smuggling activity. J.A. 232-34. He also confessed to a February 1997 assault on the cooperating witness who had previously assaulted Mr. Casso in December 1996. *Id.*

In addition, Mr. Casso's counsel, in an August 1, 1997, letter, informed the government that Sammy Gravano and Alphonse D'Arco, two of its witnesses at the 1997 trial of Vincent Gigante, had provided perjurious testimony at that trial. J.A. 275-77. Within a week, the government reacted by declaring Mr. Casso a liar, and by terminating his cooperation agreement based on the August 1, 1997, letter, as well as on Mr. Casso's prior prison misconduct. J.A. 271-74.

Mr. Casso announced his intention to move to compel the government's specific performance of its obligations under the cooperation agreement. In support of his motion, Mr. Casso filed affidavits from himself and his counsel totalling 75 pages, along with dozens of exhibits. J.A. 209-350.

In his papers, Mr. Casso argued that the government had waived any objection to the prison misconduct because it had known about it for at least months, and in some instances years, before it canceled the agreement; that Mr. Casso's statements in the August 1, 1997, letter were true (except for his account of one incident, which Mr. Casso quickly corrected); that the government was unfairly and arbitrarily punishing Mr. Casso for conduct it regularly tolerated from other cooperating witnesses; and that the government had never intended to honor its obligations under the agreement, as evidenced by the repeated press leaks and innuendo that denigrated Mr. Casso's credibility.

At the first court appearance regarding that motion, Judge Eugene H. Nickerson ordered an evidentiary hearing. J.A. 135-37. Within days, however, the government recused Judge Nickerson based on information it possessed for more than three years, but which it had not previously disclosed to Judge Nickerson. Subsequently, Mr. Casso was denied the hearing Judge Nickerson had ordered, and Mr. Casso's motion was denied.

Mr. Casso was then sentenced to life imprisonment, and expelled from the Witness Security Program. Presently, he is confined at the administrative maximum security facility at Florence, Colorado.

REASONS FOR GRANTING THE WRIT

I. *THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE SECOND AND EIGHTH CIRCUIT COURTS OF APPEALS*

The Second Circuit's decision below is in direct conflict with the Eighth Circuit's decision in *United States v. Anzalone*, 148 F.3d 940 (8th Cir.), *opinion vacated and rehearing* ***en banc*** *granted* 148 F.3d 940, ***en banc*** *hearing order vacated, and panel opinion reinstated*, 161 F.3d 1125 (1998).

Both address an important issue in criminal law – which is likely to be repeated as the number of cooperators in the criminal justice system continues to increase – that this Court has yet to decide: under what circumstances may the government refuse to submit a §5K1.1 motion on behalf of a defendant who has provided "substantial assistance."

Section 5K1.1 itself is silent on the subject. By its plain language, it vests "substantial weight" to the government's only with respect to its "evaluation of the extent of the defendant's assistance." *See* Commentary, U.S.S.G. §5K1.1, Application Note 3. Here, the government conceded below (and the District Court

found) that Mr. Casso did indeed provide "substantial assistance." J.A. 108, 420; Appendix A at A6.

Section 5K1.1 does not provide any direction with respect to whether the government may refuse to file the §5K1.1 motion based on factors *other* than the lack of "substantial assistance," or what deference, if any, the courts should afford the government with respect to its decision to renounce its obligation to file a §5K1.1 motion.

It is in that context – when a defendant, such as Mr. Casso, has provided "substantial assistance," but the government nevertheless refuses to file the §5K1.1 motion for *other* reasons – that the Second and Eighth Circuits so dramatically diverge.

This Court, in *Wade v. United States*, 504 U.S. 181 (1992), addressed only *constitutional* limitations on a government's discretion to file or not file a §5K1.1 motion in the *absence* of a written cooperation agreement between the defendant and the government.[2]

Here, in contrast, Mr. Casso and the government executed a written cooperation agreement, and the government conceded that Mr. Casso rendered "substantial assistance." J.A. 261-270, 420. *See United States v. Lezine*, 166 F.3d 895, 901 (7th Cir. 1999) ("the Government limits its discretion [with respect to filing a §5K1.1 motion] when it enters into a plea agreement . . .").

As set forth in its decision below, the Second Circuit's position is that it "will examine the government's refusal [to file

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[2] This Court did state (and the government conceded) in *Wade* that relief would have been appropriate if "the prosecutor's refusal to move [under §5K1.1] was not rationally related to any legitimate Government end[.]" 504 U.S. at 186 (citation omitted).

a §5K1.1 motion] to see whether it has 'acted fairly and in good faith.'" Appendix B at A23, *quoting United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996).

However, the Second Circuit severely circumscribes its review of the government's decision: "the government's assessment of [a defendant's] honest compliance [with the terms of a cooperation agreement] is 'binding' on [the defendant]." Appendix B, at A23, *quoting United States v. Pollack*, 91 F.3d 331, 334 (2d Cir. 1996).

The Second Circuit, following its prior decisions, added below that

> where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied.

Appendix B at A23, *quoting Pollack* and *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990).

Thus, the Second Circuit permits the government to repudiate its obligation to file a §5K1.1 motion if it is "honestly dissatisfied" with *any* aspect of a defendant's performance (and *not* just a failure to provide "substantial assistance").

In stark and compelling contrast, the Eighth Circuit, in *Anzalone*, reiterated its own rule that

> "the government cannot base its [§5K1.1 motion] decision on factors other than the substantial

> assistance provided by the defendant."

148 F.3d at 941, *quoting United States v. Rounsavall*, 128 F.3d 669 (8th Cir. 1997). *Cf. United States v. Wilkerson*, 179 F.3d 1083, 1086 (8th Cir. 1999) (*Anzalone* did not apply because District Court found that government's refusal to file §5K1.1 motion was "based on its conclusion that [the defendant] had not met his duty under the plea agreement to continue to cooperate *and to provide substantial assistance*") (emphasis added).

In *Anzalone*, the defendant had used drugs subsequent to executing the plea/cooperation agreement, yet the Court found that was not a valid basis for the government's refusal to submit the §5K1.1 motion on the defendant's behalf. *Id.* Noting that "sentencing is 'primarily a judicial function,'" *id., quoting United States v. Mistretta*, 488 U.S. 361, 190 (1989), the Eighth Circuit ruled in *J* that

> [o]nce the government concludes that a defendant has provided substantial assistance, and has positively assessed in that regard "the cost and benefit that would flow from moving," *Wade [v. United States*, 504 U.S. at 187], it should make the downward departure motion and then advise the sentencing court if there are unrelated factors, . . . that in the government's view preclude or severely restrict any downward departure relief.

148 F.3d at 941-42.

Thus, under the Eighth Circuit's construction, the

government brings any misconduct to the sentencing court's attention, and "[t]he district court may of course weigh such alleged conduct in exercising its downward departure discretion." 148 F.3d at 942 (citations omitted).[3]

The Eighth Circuit's solution makes perfect sense. It preserves the "judicial" character of sentencing by permitting the sentencing court to determine the impact of post-agreement misconduct upon the extent of any downward departure. Otherwise, the government is afforded unfettered discretion to determine what misconduct will result in revocation of a cooperation agreement.

The Second Circuit's approach, on the other hand, invites abuse, a perfect example of which is this case. Mr. Casso's (more than) "substantial assistance" notwithstanding, the government terminated Mr. Casso's cooperation agreement based on alleged violations that (a) were *not* material; (b) were *not* proven; and (c) were *not* consistently the bases for revocation when committed by other similarly situated cooperating defendants.

For example, even the District Court conceded that Mr. Casso's alleged misconduct (upon which the government relied in refusing to file the §5K1.1 motion) did not impair his cooperation, or its value to the government. Appendix A at A12.

Also, upon receipt of the August 1, 1997, letter from Mr. Casso's counsel, the government instantly decided Mr. Casso – and not either Mr. Gravano or Mr. D'Arco – was lying without

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[3] In *United States v. Padilla*, 186 F.3d 136, 142 (2d Cir. 1999), the Second Circuit tacitly recognized its conflict with *Anzalone* by expressly declining to reach (because it did not need to) the issue decided in *Anzalone*: whether the government could "decline to file the [§5K1.1] motion for a reason unrelated to the defendant's substantial assistance[.]"

any investigation, or *any* proof.

In addition, the government did not revoke the cooperation agreements and §5K1.1 motions of other cooperating defendants *in the same case*. For instance, Salvatore Miciotta, the inmate whose assault by Mr. Casso the government cited in terminating Mr. Casso's agreement, had viciously assaulted Mr. Casso *first* two months earlier.

Mr. Miciotta also lied on the witness stand, smuggled a gun into the courthouse during his testimony (he had been released on bail during his cooperation), and committed offenses such as assault and fraud while at liberty during his cooperation. Yet the government's motion was responsible for Mr. Miciotta's sentence being reduced from 14 years to five years' imprisonment. J.A. 233-34, 330-34, 461, 466.

Similarly, Carmine Sessa also smuggled contraband into a protective custody unit, J.A. 252-53, and lied to federal agents when he denied carrying a gun and assaulting his wife (he, too, had been released on bail, J.A. 234). Inexplicably, however, in light of the government's treatment of Mr. Casso for comparatively minor alleged infractions, Mr. Sessa's misconduct did not result in forfeiture of the §5K1.1 motion on his behalf.

By comparison, the Eighth Circuit's approach promotes the primary purpose of the Sentencing Guidelines, of which §5K1.1 is an increasingly integral component. The Guidelines were designed to eliminate unwarranted and arbitrary disparities in sentencing, which are aggravated in the §5K1.1 context by the expansion of prosecutorial, rather than judicial, sentencing authority. *Anzalone* solves that problem by appropriately vesting ultimate judgment in the sentencing court.

Here, the government's arbitrary and inconsistent treatment of Mr. Casso is not only contrary to the Guidelines' objective of uniformity in sentencing of similarly situated

defendants, but also stems directly from the government's ability to deny defendants the benefits of their cooperation even though the government has received its part of the bargain.

In fact, Second Circuit's standard eviscerates the bilateral nature of contracts between the government and criminal defendants embodied in plea/cooperation agreements by eliminating the critical contract law principle of materiality by allowing one party – the government – to rescind a contract even though the other party's transgression is *not* material.[4]

In the plea/cooperation agreement context, in which the Due Process guarantee augments traditional contract law analysis, *see, e.g., In re Altro*, 180 F.3d 371, 375 (2d Cir. 1999),[5] it is

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[4] The Restatement (Second) of Contracts defines materiality as follows:

> [i]n determining whether a failure to render . . . performance is material, the following circumstances are significant: . . . the extent to which the injured party will be deprived of the benefit which he reasonably expected; . . . the likelihood that the party failing to perform . . . will cure his failure, taking account of all circumstances; [and] . . . the extent to which the behavior of the party failing to perform . . . comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts, §241 at 237 (1981) (emphasis added). *See also United States v. Crawford*, 20 F.3d 933, 935 (8th Cir. 1994).

[5] In *In re Altro,* the Second Circuit explained that it has

inconceivable that such an important element of contract law – materiality – would be ignored to a defendant's detriment. Yet the Second Circuit's standard, which leaves the government with essentially unbridled discretion to terminate cooperate agreements with defendants, dispenses with it (and with it, Due Process).

Also, by releasing any brakes on the government's conduct (and/or review thereof), the Second Circuit's approach jeopardizes the system of cooperation itself. If defendants cannot predict with confidence that there will some standard of materiality applied to their post-agreement conduct, and/or some objective evaluation by

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> long interpreted plea agreements under principles of contract law, . . . but have noted that plea agreements . . . are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain. [] Our concern for fairness is rooted in an appreciation of the fact that, unlike ordinary contracts, plea agreements call for defendants to waive fundamental constitutional rights, and in an awareness that the Government generally drafts the agreement and enjoys significant advantages in bargaining power. [] Accordingly, we hold the Government to the most meticulous standards of promise and performance.

180 F.3d at 375 (citations and internal quotations omitted). *See also United States v. Gottesman*, 122 F.3d 150, 152 (2d Cir. 1997).

The same standards – and Due Process protections – apply to cooperation agreements as well. *See United States v. Padilla*, 186 F.3d at 140.

the courts of the government's decision whether a breach of the agreement has occurred, the government is free to revoke cooperation agreements as it chooses based on technical and/or *de minimis* violations.

Absent such protection, defendants will be discouraged from cooperating since they will not be able to rely on receiving the benefits due them following their performance under an agreement.

Here, Mr. Casso waived his fundamental rights, pleaded guilty and provided "substantial assistance." The government received *everything* for which it bargained under the agreement, yet the result for Mr. Casso was no benefit at all, and life imprisonment instead for misconduct that did not affect the value of his cooperation, and which did not cost other offenders their cooperation agreements and §5K1.1 motions.

Accordingly, it is respectfully submitted that this Court should resolve the conflict between the Second and Eighth Circuits on this important issue, and grant Mr. Casso's Petition for a Writ of Certiorari in this case.

II. *DUE PROCESS REQUIRES THAT MR CASSO BE AFFORDED A HEARING TO DETERMINE WHETHER THE GOVERNMENT ACTED IN "GOOD FAITH" WHEN IT REFUSED TO FILE A §5K1.1 MOTION ON HIS BEHALF DESPITE HIS "SUBSTANTIAL ASSISTANCE"*

The District Court denied Mr. Casso's request for a hearing because it asserted the facts were "undisputed[,]" Appendix A, at A17, and the Second Circuit affirmed the denial of the hearing "for essentially the reasons stated by the District Court." Appendix B, at A24. However, it is respectfully submitted that even under the Second Circuit's "good faith"standard, Mr. Casso should have been granted a hearing, and the failure to do so denied him Due Process.

Certainly the facts were *not* "undisputed." Indeed, the first judge assigned to the matter *granted Mr. Casso a hearing*, J.A. 137, since the government conceded that the issue was "basically a factual determination[,]" and that following discovery it would be "time for an evidentiary hearing[.]" J.A. 135-37.

Within days, though, the government revealed to the judge information it obtained from Mr. Casso three years earlier, and precipitated the judge's recusal as a result.[6] The government then vigorously resisted a hearing.[7]

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[6] The information was that Mr. Casso had participated in discussions suggesting the assassination of the judge.

[7] Mr. Casso was also denied discovery of the FBI 302 reports of his debriefings, which would have established that the information in the August 1, 1997, letter was fully consistent with his prior statements. *See United States v. Mikaelian*, 168 F.3d 380, 385-86 (9th Cir. 1999) (discovery of

In *United States v. Lezine*, 166 F.3d at 901, the Seventh Circuit held that when the government seeks to escape an obligation under a plea agreement due to a defendant's alleged failure to perform some precondition, the defendant is entitled to an evidentiary hearing. *See also United States v. Mikaelian*, 168 F.3d, 380, 385-86 (9th Cir. 1999) (remand for factual findings by district court whether government was required to file §5K1.1).

In fact, Mr. Casso satisfied even the Second Circuit's test for a hearing. The Second Circuit has instructed that when a defendant alleges that the government has acted in "bad faith" in refusing to make a §5K1.1 motion, "[t]he government 'may rebut this allegation by explaining its reasons for refusing to depart.'" *United States v. Imtiaz*, 81 F.3d 262, 264 (2d Cir. 1996), *quoting United States v. Knights*, 968 F.2d 1483, 1487 (2d Cir. 1992).

If "the government's reasons are wholly insufficient," or "the defendant's version of events, supported by at least some evidence, contradicts the government's explanation," a hearing is required. *Id.*, *citing United States v. Knights*, 968 F.2d at 1487-89, and *United States v. Leonard*, 50 F.3d 1152, 1157-58 (2d Cir. 1995). *See also United States v. Khan*, 920 F.2d 1100, 1106 (2d Cir. 1990) ("[f]ollowing the government's explanation, the second step imposes on defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue"), *citing* U.S.S.G. §6A1.3.[8]

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debriefing required since government's reliance on information therein made it crucial to determination whether government acted in "good faith").

[8] In *Wade*, this Court ruled that the defendant, in simply setting forth what assistance he had provided to the government, had not presented sufficient evidence of an improper government motive to warrant a hearing. 504 U.S. at 186-87. Here, as noted **ante**, the government conceded

Here, the averments by Mr. Casso and his counsel, totaling 75 pages, and the accompanying exhibits, J.A. 209-350, 458-84, more than amply proffered "some evidence[] contradict[ing] the government's explanation."

Consequently, the failure to grant Mr. Casso a hearing so he could establish the government's "bad faith" deprived him of Due Process. *See also* **ante**, at 18 & n. 5 (plea and cooperation agreements infused with Due Process protection to ensure that the government performs its part of the bargain). Accordingly, it is respectfully submitted that this Court should grant Mr. Casso's Petition for a Writ of Certiorari.

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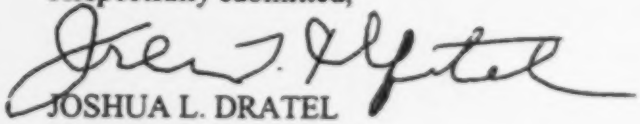
that Mr. Casso had provided "substantial assistance," and Mr. Casso provided substantial evidence of the government's "bad faith" entitling him to a hearing.

Conclusion

Therefore, for all the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated: 22 October 1999
New York, New York

Respectfully submitted,



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APPENDIX A

9 F. Supp. 2d 199, *; 1998 U.S. Dist. LEXIS 9915, **

UNITED STATES OF AMERICA,

v.

ANTHONY CASSO,

Defendant.

Case No. 90-CR-446(S-4) (FB)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

9 F. Supp. 2d 199; 1998 U.S. Dist. LEXIS 9915

June 29, 1998, Decided

DISPOSITION: [**1] Casso's motion for specific performance of his 1994 cooperation agreement denied in its entirety.

CORE TERMS: cooperation, dissatisfaction, honest, prosecutor, prison, bad faith, credibility, cooperating, dishonesty, inmate, sentencing, involvement, removal, murder, arson, good faith, material breach, pleaded guilty, materiality, downward, futile, contraband, assaulted, fraudulent intent, racketeering, dissatisfied, departure, honestly, truthful, damaged

COUNSEL: For Government: GEORGE A. STAMBOULIDIS, Assistant United States Attorney, ZACHARY W. CARTER, United States Attorney, Eastern District of New York, United States Attorney's Office, Garden City, New York.

For Defendant: MATTHEW J. BRIEF, Esq., BRIEF

KESSELMAN KNAPP & SCHULMAN, LLP, New York, New York.

JUDGES: FREDERIC BLOCK, United States District Judge.

OPINIONBY: FREDERIC BLOCK

OPINION: [*200] **MEMORANDUM AND ORDER**

BLOCK, District Judge:

Pending before the Court is a motion by defendant Anthony Casso ("Casso"), a former underboss and consigliere in the Luchese crime family, for specific performance of his 1994 cooperation agreement. The government contends that it is not obligated to file a motion for a reduced sentence pursuant to § 5K1.1 of the Sentencing Guidelines because, *inter alia*, Casso committed crimes during the term of the cooperation agreement.[9] Casso contends that the government is acting in bad faith in seeking to disavow its obligation to file the § 5K1.1 motion. Specifically, he asserts that his conduct did not constitute a material breach of the cooperation agreement, [**2] that the government's stated reasons for abrogating the cooperation agreement are a pretext, and that the government entered into the agreement with the intent to breach it at a later time. Casso also challenges the conditions of his confinement and his removal from the Witness Security Program ("Program"). For the reasons set forth below, the Court determines, *inter alia*, that Casso's commission of other crimes

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[9] Section 5K1.1 of the Sentencing Guidelines provides, in pertinent part, that"upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the [sentencing] guidelines."

while in prison, while perhaps not a material breach of the cooperation agreement, nonetheless justifies the government's honest dissatisfaction with his performance. Accordingly, Casso is not entitled to specific performance. The Court also determines that Casso must exhaust his administrative remedies in respect to his removal from the Program.

BACKGROUND

On March 1, 1994, Casso pleaded guilty before the Honorable Eugene H. Nickerson to 70 crimes, including racketeering and racketeering conspiracy in violation of 18 U.S.C. §§ 1962(c) and (d); murder, attempted murder, and conspiracy to murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1) and (a)(5); and extortion in violation of 18 U.S.C. § 1951. During his plea allocution, Casso admitted to having [*201] conspired with other members and associates of the Luchese crime family to murder fifteen people. Certain of the charges to which Casso pleaded guilty carry a mandatory term of life imprisonment. In connection with his plea, Casso signed a cooperation agreement in which he pledged: (1) to be fully debriefed and to attend meetings concerning his participation in and knowledge of criminal activities; (2) to furnish to the Office of the United States Attorney for the Eastern District of New York ("Office") all documents and other materials relevant to the investigation that were in his possession, custody or control; (3) not to reveal his cooperation to any third party; (4) to testify at any proceeding in the Eastern District of New York, or elsewhere, as [**4] requested; and (5) to consent to adjournment of his sentencing. Casso also agreed to "give complete, truthful and accurate information and testimony, and [not to] commit, or attempt to commit, any further crimes." Notice of Motion ("Not. of Mot."), at Exh. "C," pg. 7. In return, "if the Office determined that the defendant had cooperated fully, provided substantial assistance to law enforcement authorities, and otherwise complied with the terms of the agreement," id., it would

file a § 5K1.1 motion with the sentencing court setting forth the nature and extent of Casso's cooperation. However, the agreement also provided:

> Should it be judged by the Office that ANTHONY CASSO . . . has failed to cooperate fully, or has intentionally given false, misleading, or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, ANTHONY CASSO will not be released from his plea of guilty but this Office shall be released from its obligation under this agreement . . . to file the motion described . . . above.

Not. of Mot., at Exh. "C," pg. 8.

In addition, the agreement stated:

> If [**5] the defendant requests and in the Office's judgment the request is reasonable, the Office will make application and recommend that the defendant . . . be placed in the Witness Security Program, it being understood that the Office has authority only to recommend, and the final decision to place an applicant in the Witness Security Program rests with the Department of Justice, which will make its decision in accordance with applicable Departmental regulations.

id. at pg. 9. The government did indeed recommend Casso for the Program, and the Department of Justice admitted him.

By letter dated August 8, 1997, Casso's attorney was advised that it was the government's position that Casso had breached the cooperation agreement, and that the government would not submit

a § 5K1.1 motion to the Court. Thereafter, on September 5, 1997, the government gave three reasons for its determination: (1) while imprisoned, Casso had assaulted another inmate; (2) Casso had participated in the smuggling of contraband into prison, and had bribed prison officials as part of this scheme; and (3) in an August 1, 1997 letter to the government, Casso had fabricated false information regarding the [**6] testimony of two other cooperating witnesses, Alphonso D'Arco ("D'Arco") and Salvatore Gravano ("Gravano"). Casso does not dispute having assaulted another inmate and does not contend that the assault was undertaken in self-defense, although he points out that there was bad blood between the two and that the other inmate had savagely attacked Casso several months earlier. Casso also admits to having bribed prison officials to smuggle contraband into the prison. Casso was transferred to another facility on August 29, 1997, and was removed from the Program on October 9, 1997. This motion ensued.

In support of his claim that the government has acted in bad faith, Casso contends that: (1) his proffer session was unusually brief; (2) the government never allowed him to prove himself as a prosecution witness and would not permit him to testify at a State criminal trial in Kings County; (3) the government has not followed up on leads he provided; (4) agents from the Drug Enforcement Agency have never interviewed him; (5) the Office has repeatedly leaked information from Casso to the press; (6) the Office has warned other cooperating witnesses to stay away from him; (7) a prosecutor stated [**7] [*202] in 1995 that he believed that Casso could not be used as a witness; and (8) a former prosecutor, discussing the trial of Vincent Gigante with the *New York Times* several months before Gigante's trial took place, did. not mention Casso as a potential witness.

Although, as noted above, Casso admits to having assaulted another inmate and to having bribed prison guards to smuggle contraband into the prison facility, he claims that the government has singled him out for punishment and that other inmates have

engaged in similar conduct without having their cooperation agreements terminated. Finally, Casso claims that he is being punished for providing information that calls into question the credibility of Gravano and D'Arco. Casso requests a hearing regarding his allegations of bad faith. He also contends that he is being treated very harshly by prison officials and that, because of risks to his personal safety, he should be reinstated to the Program and moved to a Witness Security Unit.

The government concedes that Casso has given substantial assistance to law enforcement authorities, but argues that Casso's undisputed commission of crimes while in prison and his alleged fabrication [**8] of information regarding D'Arco and Gravano constitute breaches of the cooperation agreement that relieve the government from its contractual duty to file a § 5K1.1 motion. The government also contends that the Attorney General acted within her discretion in removing Casso from the Program based upon his commission of other crimes.

DISCUSSION

I. General Principles Applicable to the Government's Refusal to File § 5K1.1 Motion

In recent years, the Court of Appeals for the Second Circuit has set forth broad principles regarding the circumstances under which prosecutors may refuse to file a § 5K1.1 motion. As a general rule, "although federal prosecutors have considerable discretionary control over whether to move, under § 5K1.1, for a downward departure by reason of cooperation, that discretion is by no means unlimited." *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996). The Second Circuit has held that a district court may review the government's determination not to file a § 5K1.1 motion "for misconduct, bad faith, or an unconstitutional motive, such as the defendant's race or religion." *United States v. Avellino*, 136 F.3d 249, 260 (2d Cir. 1998); [**9] see also *Brechner*, 99 F.3d at 99; *United States v. Pollack*, 91 F.3d 331, 335 (2d Cir.

1996); *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990); *United States v. Harpaul*, 4 F. Supp. 2d 137, 1998 U.S. Dist. LEXIS 5913, *6, 1998 WL 208817, at *3 (E.D.N.Y. 1998). Although "criminal sentencing proceedings are not the same as civil contract disputes," the Second Circuit has routinely applied basic contract principles in construing parties' obligations under cooperation agreements. Id. at 1105; *Rexach*, 896 F.2d at 713. Thus, the Second Circuit has made it clear that "there is an implied obligation of good faith and fair dealing in every cooperation agreement, and the reviewing court may properly inquire into whether the government has lived up to its end of the bargain." See *United States v. Fernandez*, 127 F.3d 277, 285-86 (2d Cir. 1997); *Brechner*, 99 F.3d at 99; *Rexach*, 896 F.2d at 714. "[A] presumption of fairness underlies agreements between the defendant and the prosecutor, so that when a prosecutor makes a promise and obtains in return cooperation from a defendant, the promise must be kept." *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1992). [**10]

In *United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992), the Second Circuit identified categories of conduct by a defendant that will not excuse the government from filing a § 5K1.1 motion. In Knights, the defendant had entered into a cooperation agreement and had testified regarding drug trafficking. The government indicated that it would not be filing a § 5K1.1 motion, giving six reasons for its decision: (1) Knights' cooperation was untimely; (2) he was more culpable than the other defendant against whom he had testified; (3) he had pleaded guilty only because his brother had also pleaded guilty; (4) he had received certain benefits by pleading guilty; (5) the clause in the plea agreement regarding the § 5K1.1 motion had not been [*203] specifically bargained for; and (6) the defendant's trial testimony had been inconsistent with that of his brother.

In vacating the sentence imposed and remanding for further proceedings on the issue of the government's bad faith, the Second Circuit determined that the first four reasons given by the

government related to circumstances that preceded the execution of the cooperation agreement. Because of the government's knowledge of those [**11] circumstances prior to executing the agreement, "not only would it be unfair for the government to rely upon such known, pre-agreement circumstances as reason for not moving, it would have been fraudulent to have induced a defendant's plea with a promise that the government already knew it was not going to keep." Id. at 1488. The court found the government's fifth reason -- that the § 5K1.1 clause had not been bargained for -- to be frivolous. As to the sixth reason -- that Knights' testimony had been inconsistent with his brother's -- the court noted that the government could not walk away from its agreement with the defendant because his testimony contained information that the government did not want to hear, or because the government ultimately lost its case against a co-defendant.

The more typical cases are those in which the defendant has in some manner violated the cooperation agreement, either by failing to provide substantial assistance or by committing acts of dishonesty during the term of the agreement. Relying upon language from the Second Restatement of Contracts regarding satisfaction as a condition to performance under a contract, the Second Circuit articulated [**12] in *Rexach* the following test in assessing in that case the *bona fides* of the government's dissatisfaction with the defendant's assistance: "where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied." See *Rexach*, 896 F.2d at 710 (citing Restatement (Second) of Contracts § 228, comment a); see also *Khan*, 920 F.2d at 1105.[10]

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[10] Restatement (Second) of Contracts § 228 provides in full:

> When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's

Recognizing that the decision whether [**13] to file a § 5K1.1 motion was quintessentially a matter of prosecutorial discretion, the Second Circuit noted in *Rexach* that "the question of 'substantial assistance' is 'self-evidently a question that the prosecution is uniquely fit to resolve.'" *Rexach*, 896 F.2d at 713 (quoting *United States v. Huerta*, 878 F.2d 89, 94 (2d Cir. 1989)). The concept of honest dissatisfaction thus appropriately acknowledges prosecutorial discretion, while at the same time providing a template for adjudging the circumstances under which the prosecution will be permitted to renounce its obligation to file a § 5K1.1 motion based upon a failure to provide substantial assistance.

Honest dissatisfaction is a particularly apt analytic standard where the prosecution is contesting the defendant's substantial assistance because a determination as to whether the defendant has not performed satisfactorily under the cooperation agreement in such cases is necessarily both subjective and highly discretionary. However, since *Rexach*, the Second Circuit has also used the concept of honest dissatisfaction as a means of evaluating the government's disavowal of cooperation agreements based upon acts of [**14] dishonesty, although such violations are analytically rather different from the failure to render substantial assistance. In contrast to the inquiry into a defendant's substantial assistance, inquiries into dishonesty are more objectively

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> performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.

fact-specific, and therefore lend themselves to evaluation in accordance with the basic concept by which a breach of contract is assessed -- its materiality. The same can be said, of course, with regard to the commission of crimes.

Thus, subsequent to *Rexach*, the Second Circuit has recognized that acts of dishonesty invariably constitute material breaches of a [*204] cooperation agreement since lying or lack of candor intrinsically undermines a cooperator's credibility and damages the government's case. It has, nonetheless, adhered to the honest dissatisfaction standard articulated in *Rexach*, although acknowledging, either implicitly or explicitly, that the materiality of the breach would obviously serve as an independent basis for nullification of the cooperation agreement. For example, in *United States v. Resto*, 74 F.3d 22 (2d Cir. 1996), even though the defendant had concededly provided substantial assistance, the prosecutor alleged, and [**15] the court specifically noted, that he had, inter alia, lied to prosecutors. While the court viewed this transgression as a breach of the agreement, it cited to Rexach and its "honest dissatisfaction" language in determining that the prosecutor had "ample, good faith grounds to decline to move for a downward departure." *Resto*, 74 F.3d at 27.

In *Pollack*, *supra*, the Second Circuit specifically looked both to the government's honest dissatisfaction and the defendant's material breach. The defendant, an attorney, was arrested in connection with an embezzlement scheme involving his client, a labor union. After he was arrested, he signed a cooperation agreement and provided substantial assistance to the government in connection with its investigation. The government, however, refused to file a § 5K1.1 motion, ostensibly because Pollack had failed to disclose his involvement in an entirely separate crime -- the destruction of his house in Florida by arson. Pollack contended, *inter alia*, that he was under no obligation to volunteer information regarding his possible involvement in an unrelated arson investigation, and that the government was acting in bad faith by gaining [**16] the benefit of his substantial performance

and then seizing upon the existence of the arson investigation as a pretext for excusing its performance under the cooperation agreement. The Second Circuit, however, found that the government had cause to be "honestly dissatisfied" with Pollack's performance based upon its good faith belief that Pollack was involved in the arson and then lied about it. 91 F.3d at 336. In addition, the court also concluded that, "based upon the language of the cooperation agreement, the government could reasonably conclude that [the defendant] was in material breach of the agreement when he lied about his involvement in the arson. Accordingly, the government was justified in withholding the § 5K1.1 letter . . . ." id.

Similarly, in *Brechner*, *supra*, the Second Circuit cited to the "honest dissatisfaction" language of *Pollack*, but its analysis focused upon the defendant's alleged breach and the effect of such breach upon the government's case. As in *Resto* and *Pollack*, the defendant had unquestionably provided substantial assistance. However, during a debriefing session, *Brechner* initially denied having received kickbacks from two individuals. [**17] He quickly changed his story after consulting briefly with counsel in private, confessed that he had in fact received kickbacks, and provided details regarding the payments. Thereafter, the government sought to disavow its obligation to file the § 5K1.1 motion based upon *Brechner's* purported dishonesty. The district court found that *Brechner's* cooperation and substantial assistance warranted the motion, despite his false statements during the debriefing session. However, the Second Circuit reversed, finding that although *Brechner* "swiftly corrected" his misstatements, they nonetheless "seriously undermined [his] credibility as a potential government witness." 99 F.3d at 99. The court held:

> As we have previously explained, a cooperating defendant's truthfulness about his own past conduct is highly relevant to the quality of his cooperation. By lying to the prosecutor during the period of his cooperation about his own criminal

> involvement, *Brechner* made it impossible for the government to argue at any future trial that, despite his past sins, *Brechner* had acknowledged his guilt, turned over a new leaf, and cooperated in a truthful and trustworthy manner. The disclosure of [**18] *Brechner's* lies . . . would have brought on harsh cross-examination and a powerful argument that Brechner was no more trustworthy as a cooperating witness than he had been as a crook.

id. at 99-100. See also *Fernandez*, 127 F.3d at 286 ("The government's refusal to make a § 5K1.1 motion is justified where the defendant [*205] breached his cooperation agreement in a way that damaged the case in which he was cooperating.").

Thus, in cases which involved acts of dishonesty, or which otherwise damaged the prosecutor's case, the Second Circuit has essentially, though not necessarily so articulating, collapsed the overarching concepts of material beach and honest dissatisfaction. In the present case, however, these concepts do not necessarily merge since, as the defendant cogently argues, his admitted current criminal misdeeds pale in comparison to his bone-chilling criminal record and, hence, cannot realistically be deemed to have any material impeachment value or to otherwise have any particular relevance to the government's case. Indeed, while it appears that the Second Circuit has consistently applied the honest dissatisfaction standard whenever the defendant's conduct has [**19] arguably damaged the government's case, it has yet to clearly, if at all, invoke this standard in a situation when the breach, such as reflected by the commission of the crimes in the present case, cannot realistically be perceived as materially adversely impacting a defendant's credibility.

II. Did the government fraudulently induce Casso to enter into the cooperation agreement?

Initially, as noted above, *Casso* claims that the government entered into the cooperation agreement fully intending to breach its obligations thereunder at a later time. As the Second Circuit made clear in Knights, the government will not be permitted to renounce its obligation to file a § 5K1.1 motion if it fraudulently induced the defendant to enter into the cooperation agreement, that is to say, if it executed the agreement never intending to comply with its terms. Although "equity will interfere to grant relief where necessary to prevent the consummation of a fraud," *Adams v. Gillig*, 199 N.Y. 314, 322, 92 N.E. 670, 673 (1910), courts "have repeatedly rejected attempts to convert a breach of contract claim into a fraud claim by merely alleging that a contracting party never intended [**20] to fulfill its promise under the agreement." *SKR Resources, Inc. v. Players Sports, Inc.*, 938 F. Supp. 235, 238 (S.D.N.Y. 1996). Consequently, "'allegations of fraud must be supported by the pleading[] of specific facts tending to show that, at the time the defendant made the asserted representations and promises, it never intended to honor its stated intentions.'" id. at 238 (quoting *Carlucci v. Owens-Corning Fiberglas Corp.*, 646 F. Supp. 1486, 1491 (E.D.N.Y. 1986)) (other internal citations omitted). "Normally, allegations of mere nonperformance under a contract do not provide strong evidence of fraudulent intent. . . . In such circumstances, fraudulent intent may only be inferred 'when a [party] violates an agreement so maliciously and so soon after it is made that [its] desire to do so before [it] entered into the agreement is evident.'" *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 664 (2d Cir. 1997) (quoting *Powers v British Vita*, P.L.C., 57 F.3d 176, 185 (2d Cir. 1995)); see also *Spier v. Erber*, 1997 U.S. Dist. LEXIS 602, 1997 WL 26727, at *10 (S.D.N.Y. Jan. 23, 1997).

Casso simply has not made a showing that the government did not intend to honor [**21] the agreement at its inception -- either by demonstrating that the government "maliciously" violated the

agreement soon after it was made, or otherwise. As noted above, *Casso* has made a number of arguments in support of his claim that the government has acted in bad faith. He argues at length that the government did not adequately exploit him as a possible witness; however, the government freely concedes that *Casso* has provided substantial assistance to its organized crime investigations. His remaining arguments fare no better. His assumption that the United States Attorney's Office must have been the source of certain leaks to the press is completely speculative, and, in any event, of no material significance. The fact that a former Assistant United States Attorney suggested to the press that *Casso* would not be called as a witness in the trial of Vincent Gigante is of absolutely no probative value. Finally, the Court is unable to discern why warnings given by certain Assistant United States Attorneys to other inmates to stay away from Casso are even remotely relevant to a determination as to whether the government intended to breach the cooperation agreement. In sum, *Casso's* arguments [**22] [*206] are at best ambiguous and "are insufficient to raise a strong inference of fraudulent intent." *Campaniello Imports*, 117 F.3d at 664. Having concluded that Casso has not made a sufficient showing that the agreement was fraudulently induced, the Court consequently determines that the agreement is valid and enforceable. See *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1541 (2d Cir. 1997).

III. Does Casso's commission of crimes justify the government's honest dissatisfaction?

Casso, in effect, argues that materiality is an essential benchmark for measuring his entitlement to specific performance. Although Casso admits to having assaulted another inmate while in prison and to having smuggled contraband into the facility, he contends that these conceded crimes do not constitute material breaches of the cooperation agreement. In support of this argument, he points out that other who have committed comparable or even more serious crimes have not been treated as harshly as he. Moreover, Casso appears to argue that, because of his violent background,

minimal, and hence cannot, in good faith, [**23] be relied upon by the government as a basis for its decision not to file the § 5K1.1 motion.

The Court agrees that the new crimes, when considered together with the 15 murders to which Casso has confessed, are not realistically likely to have an impact upon his credibility, nor, as in Brechner, do they necessarily reflect upon his dishonesty. The Court nonetheless determines that, even if the government never intended to have Casso testify as a witness, as Casso maintains, his commission of serious crimes during the period of his cooperation must be viewed as an adequate predicate for the government's honest dissatisfaction. The Court observes that the clear language of the cooperation agreement conditions the government's obligation to file the § 5K1.1 letter not only upon its determination that Casso has provided substantial assistance, but also upon its determination that Casso has provided truthful information and has refrained from further criminal behavior during the term of the agreement. See Not. of Mot. at pp. 7-8. The Court concludes that, even if the potential impeachment value of additional crimes is de minimis, the government should nonetheless be permitted, [**24] within the confines of the honest dissatisfaction standard, to evince its lack of tolerance for subsequent criminal conduct by a cooperating witness.

The government should not be required to turn a blind eye to criminal conduct by cooperating witnesses merely because such conduct, when considered in connection with past misdeeds, may not materially alter the jury's view of such a witness, or because other criminals may have engaged in similar conduct. Simply put, criminal behavior by cooperators should be condemned, not condoned, and repudiation of the government's obligations under a cooperation agreement is an effective means of delivering such an important message. Moreover, the strict materiality standard urged by Casso would, as a practical matter, lead to perverse and counter-intuitive results, since the more egregious a defendant's criminal history, the less likely it is that the commission of crimes

criminal history, the less likely it is that the commission of crimes during the term of a cooperation agreement will have an ascertainable impact upon the defendant's credibility. In sum, Casso's commission of other crimes during his incarceration gave the government a good faith basis for its honest dissatisfaction with his performance.

Casso [**25] also argues that the government should be estopped from declining to make the § 5K1.1 motion. However, it is well established that "estoppel is an equitable remedy which requires that the party invoking such must do so with clean hands." *Rodgard Corp. v. Miner Enterprises, Inc.*, 914 F. Supp. 907, 928 (W.D.N.Y. 1995), aff'd in part, vacated in part on other grounds, 108 F.3d 1394 (2d Cir. 1997); see also *Stone v. Williams*, 891 F.2d 401, 404 (2d Cir. 1989) (quoting *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F. Supp. 866, 874 (E.D.N.Y. 1978) ("One who seeks Equity's assistance must stand before the court with clean hands.")). As Casso's hands are decidedly unclean, he is not entitled to invoke the equitable doctrine of estoppel. Accordingly, [*207] the government is not required to apply to the Court for a downward departure pursuant to § 5K1.1.

IV. Are there additional grounds that would justify the government's honest dissatisfaction?

As also noted above, the government also argues that Casso's alleged fabrication of information about D' Arco and Gravano in Casso's August 1, 1997 letter serves as an additional basis for its refusal to file a § 5K1.1 motion. [**26] Although the Court has determined that the commission of other crimes serves as an adequate, independent predicate for the government's decision not to file the motion, the Court notes that Casso has since retracted one of the statements contained in the letter -- that Gravano told him that he had ordered the stabbing of the Reverend Al Sharpton. Moreover, Casso's statements regarding Gravano's involvement in narcotics trafficking are completely inconsistent, and his explanation for this inconsistency -- his alleged belief that

wholly self-serving. In light of the Second Circuit's reversal in *Brechner*, these admitted inconsistencies in Casso's statements, which have an adverse impact upon his overall credibility, are further justification for the government's refusal to file the § 5K1.1 motion.

V. Is Casso entitled to a hearing?

Casso has requested a hearing in respect to his allegations of bad faith. However, a hearing need not be granted "unless the district court has sufficient information to place the issue of the prosecutor's good faith reasonably in dispute." *Khan*, 920 F.2d at 1102. The Second Circuit [**27] has explained a defendant's burden as follows:

> Defendant must first allege that he or she believes the government is acting in bad faith. Such an allegation is necessary to require the prosecutor to explain briefly the government's reasons for refusing to make a downward motion. Inasmuch as a defendant will generally have no knowledge of the prosecutor's reasons, at this first or pleading step the defendant should have no burden to make any showing of prosecutorial bad faith. Following the government's explanation, the second step imposes on defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue.

Id.. at 1106. Therefore, "unless the government's reasons are wholly insufficient, or unless the defendant's version of events, supported by at least some evidence, contradicts the government's explanation, no hearing is required." *United States v. Imtiaz*, 81 F.3d 262, 264 (2d Cir. 1996). Since the facts upon which the Court has relied in determining that the government could be honestly dissatisfied with the defendant's performance are undisputed, and since Casso's allegations of fraud in the inducement are [**28]

skeletal and insubstantial, there is no need for a bad faith hearing.

VI. Casso's Removal from the Program

Casso also seeks an order returning him to the Program. The government maintains that the Attorney General acted within her discretion in removing Casso from the Program. However, it is uncontested that Casso has not sought to challenge his removal from the Program administratively, claiming, in a conclusory fashion, that such a challenge would be futile. By letter dated March 3, 1998, the government advised Casso that the Office of Enforcement Operations of the Bureau of Prisons would entertain a grievance challenging his removal from the Program, provided such challenge was filed within 15 days. By letter to the government dated March 6, 1998, counsel for Casso stated that a challenge would be futile and that the Court should properly decide the issue.

It is well established that "'a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" *Able v. United States of America*, 88 F.3d 1280, 1288 (2d Cir. 1996) (quoting *Howell v. Immigration and Naturalization* [**29] Serv., 72 F.3d 288, 291 (2d Cir. 1996)) (other internal quotations omitted); see also *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996). However, exhaustion of administrative remedies may be excused if administrative appeal would be [*208] futile. See *Pavano*, 95 F.3d at 150; *Abel*, 88 F.3d at 1288. Casso argues that, under the circumstances here, exhaustion would "obviously be futile," Memorandum of Law, at pg. 33 n.5, but sets forth no basis for this assumption. Nor does it necessarily follow that the Bureau of Prisons would refuse to entertain a grievance filed at this late date where, as here, the defendant has taken prompt action to challenge the Bureau's determination in the judicial forum. Although Casso seeks to cast his argument that he should be returned to the Program as implicating his constitutional right to effective assistance of counsel, the argument is in fact an administrative matter that should first be considered by the

Attorney General or her designee pursuant to 18 U.S.C. § 3521(d)(1). "Parties are generally required to exhaust their administrative remedies, in part because of concerns for separation of powers (i.e., the need to limit judicial interference [**30] in the agency process) . . ." *Pavano*, 95 F.3d at 150. Accordingly, Casso's request for an order moving him into a Witness Security Unit is denied pending administrative review of his claim that he was improperly removed from the Program.

CONCLUSION

For the foregoing reasons, Casso's motion is denied in its entirety.

SO ORDERED.

Dated: Brooklyn, New York

June 29, 1998

FREDERIC BLOCK
United States District Judge

APPENDIX B

1999 U.S. App. LEXIS 8399, *

UNITED STATES OF AMERICA,

Appellee,

-v.-

VINCENT GIGANTE, et al.,

Defendants,

ANTHONY CASSO,

Defendant-Appellant.

98-1413

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1999 U.S. App. LEXIS 8399

April 28, 1999, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: **1999 U.S. App. LEXIS 13103.**

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York (Block, J.).

DISPOSITION: AFFIRMED IN PART and VACATED AND REMANDED IN PART.

CORE TERMS: cooperation, commit, cooperators, smuggling,

evidentiary hearing, right to counsel, pleaded guilty, reasons stated, bad faith, credibility, prosecutor, falsehood, assault, binding, prison, waived, murder

COUNSEL: APPEARING FOR APPELLANT: JOSHUA L. DRATEL, New York, NY.

APPEARING FOR APPELLEE: GEORGE A. STAMBOULIDIS, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney, Eastern District of New York, David C. James, Assistant United States Attorney, on the brief).

JUDGES: PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND, HON. DENNIS JACOBS, HON. CHESTER J. STRAUB, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART.**

Anthony Casso appeals from a judgment of conviction and sentence, entered after guilty plea, in the United States District Court for the Eastern District of New York. Specifically, Casso objects to the district court's refusal to order the government to make a [*2] substantial assistance motion pursuant to his cooperation agreement. See *United States v. Casso*, 9 F. Supp. 2d 199 (E.D.N.Y. 1998).

Casso, a former "underboss" of the Luchese crime family, pleaded guilty in March 1994 to 70 offenses, including substantive and conspiracy counts of murder and extortion. During his plea allocution, he admitted to having conspired to commit 15 murders. Casso's sentencing guideline calculation called for a sentence of life imprisonment, but he entered into a cooperation agreement with the government that created the possibility of a government

motion for a reduced sentence under§ 5K1.1 of the Sentencing Guidelines. See *Casso*, 9 F. Supp. 2d at 200-01.

In the cooperation agreement, Casso agreed, inter alia, (i) to "give complete, truthful and accurate information and testimony" and (ii) not to "commit, or attempt to commit, any further crimes." According to the agreement, the government's "determination of whether [Casso] has cooperated fully and provided substantial assistance, and the Office's assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him." Moreover, if the government "judged" [*3] that Casso "failed to cooperate fully, or has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this Agreement," the government will be released from its obligation to file the§ 5K1.1 motion.

On August 8, 1997, the government advised Casso that it believed he had breached the cooperation agreement and that it would therefore not file the substantial assistance motion. Subsequently, the government provided three explanations for its decision: (i) Casso had assaulted another prisoner; (ii) Casso had bribed prison officials to facilitate the smuggling of contraband into prison; and (iii) Casso had written a letter to the government on August 1, 1997 in which he had falsely disputed the trial testimony of two government witnesses. See id. at 201. The government has conceded that Casso provided substantial assistance to law enforcement officers. See id. at 202.

Casso invoked his contract rights, and sought an order requiring the government to make the§ 5K1.1 motion. The district court concluded that there was no evidence that the government had fraudulently [*4] induced Casso to enter into the cooperation agreement; and that the government's refusal to make the motion was justifiable by reason of (i) Casso's assault and smuggling and (ii) Casso's false statements regarding other government witnesses. The court decided that there was no need for an evidentiary hearing on the subject. See id. at 205-07.

hearing on the subject. See id. at 205-07.

The government possesses wide, but not boundless, discretion to decide whether to make a§ 5K1.1 downward departure motion. See *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996). We will examine the government's refusal to see whether it has "acted fairly and in good faith." Id.

1. Criminal Offenses. Casso argues that the court and the government erroneously relied on the assault and smuggling offenses because (i) the court applied the wrong legal standard in evaluating the government's conduct; (ii) the government waived by its continued use of Casso after it knew of the offenses; (iii) these offenses were immaterial to Casso's credibility as a witness since they paled in comparison to the crimes to which he had pleaded guilty.

Because we conclude that Casso's August 1997 letter constituted a sufficient basis for [*5] the government's voiding of the cooperation agreement, we need not reach these questions.

2. August 1, 1997 letter. As noted, the Government's assessment of Casso's honest compliance is "binding" on Casso. See *United States v. Pollack*, 91 F.3d 331, 334 (2d Cir. 1996). "Where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied." Id. at 335 (quoting *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990)).

Casso has provided no evidence suggesting that the government's dissatisfaction with the statements in the letter was "premised on bad faith, invidiousness, or dishonesty." Id. Casso concedes the falsehood of one of the statements--his claim that government witness Salvatore Gravano had admitted to ordering the stabbing of a New York public figure--although he claims (dubiously) that the falsehood was inadvertent. The district court also found that Casso's statements in the letter regarding Gravano's drug

trafficking were "completely inconsistent" with prior statements on the subject [*6] and that his explanation for the inconsistency was "wholly self-serving." *Casso*, 9 F. Supp. 2d at 207. Given the (admittedly incremental) damage these false statements did to Casso's future credibility as a witness, the government was within its rights under the cooperation agreement to refuse the§ 5K1.1 motion on this basis. Cf. *Brechner*, 99 F.3d at 99-100.

3. Other Cooperators. Casso argues that his violations of the cooperation agreement were less serious than violations committed by other cooperators who had not had their agreements voided. Given the fact-sensitive nature of witness cooperation and the subjective character of the government's decisions, we decline to order the district court to embark on a comparison.

4. Government's Course of Conduct. Casso claims that the government fraudulently induced him to enter into the cooperation agreement, having no intention of ever offering the substantial assistance motion. We reject this claim for substantially the reasons stated by the district court. See *Casso*, 9 F. Supp. 2d at 205-06.

5. Casso's Request for a Hearing. Casso argues that the district court erred in conducting no evidentiary hearing [*7] on his claim of bad faith. We affirm the ruling for substantially the reasons stated by the district court. See id. at 207.

6. Access to Counsel Claim. Citing **United States v. Ming He**, 94 F.3d 782 (2d Cir. 1996), Casso argues that the government should be ordered to offer a §5K1.1 motion as a remedy for its alleged violation of the rule that cooperators have a right to counsel at debriefing sessions with the government.

Although Casso points to a passage in a reply brief he submitted to the district court in which he raised this argument, he does not demonstrate that he met the requirement laid out in Ming He for preservation of such a claim: a "specific[]" allegation of denial of counsel and a request for a hearing on that subject. See id. at 794.

We need not decide whether Casso waived this claim or whether there was a violation of Casso's right to counsel within the meaning of Ming He. Any error was harmless, see id. at 795 (applying harmless error analysis), since an adequate basis for the government's action was provided by Casso's letter to the government, which his attorney sent and signed on his behalf.

7. Witness Protection Program. [*8] The district court declined to order the Attorney General to return Casso to the Witness Security Program, concluding that Casso had failed to exhaust his administrative remedies. See *Casso*, 9 F. Supp. 2d at 207-08. We hold that the district court was without jurisdiction to consider Casso's request. Specifically, the statute controlling the Witness Security Program provides explicitly that "the decision of the Attorney General to terminate such protection shall not be subject to judicial review." 18 U.S.C. §3521(f) (emphasis added). Because the district court does not have jurisdiction to review decisions respecting the Witness Security Program, it should have dismissed rather than denied this portion of Casso's motion. We therefore vacate and remand this portion of the district court's order for the very limited purpose of doing so.

For these reasons, the judgment of the district court is **AFFIRMED IN PART** and **VACATED AND REMANDED IN PART**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of July one thousand nine hundred and ninety nine.

USA

v

Dkt No: 98-1413

Gigante

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Anthony Casso.

Upon consideration by the appeal that decided the appeal.
It is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and

to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By:_____
Beth J. Meador,
Administrative Attorney

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